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Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, *et al.*,

Petitioners,

—v.—

FIBREBOARD CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY, PACIFIC INDEMNITY COMPANY AND FIBREBOARD CORPORATION

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CORPORATE DISCLOSURE

The following are parents of respondents Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company: CNA Financial Corporation; Loews Corporation. The following are non-wholly-owned subsidiaries of respondent Continental Casualty Company: Convida Holdings, Ltd.; Convida Compania de Seguros de Vida S.A.; Agency Management Services, Inc.

The following are parents of respondent Pacific Indemnity Company: The Chubb Corporation; Federal Insurance Company. There are no non-wholly-owned subsidiaries of respondent Pacific Indemnity Company.

Respondent Fibreboard Corporation is a corporation. Its parent company is Owens Corning. It has no non-wholly-owned subsidiaries.

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Counter-Statement Of The Case

I. Preliminary statement

The Global Settlement Agreement before this Court accomplishes the following:

1. It settles three interrelated sets of disputes — (a) a 14-year-long insurance coverage dispute between Fibreboard and its insurers (Continental and Pacific), (b) the direct claims against those insurers by a class of future asbestos victims and (c) the class's claims against Fibreboard — in return for payment by those insurers of $1.525 billion in cash, for Fibreboard's agreement to turn over that $1.525 billion to a trust for the benefit of the class and for a further $10 million direct payment to the trust by Fibreboard itself;

2. Although not resolving the claims of individual claimants, it creates an independent compensation trust designed to administer claims and pay claimants expeditiously and to reduce transaction costs drastically — including providing a cap on contingency fees — while at the same time preserving to each claimant individual control over his or her claim, including the option of recourse to the tort system.

This appeal thus presents this Court with a challenge to a $1.535 billion global settlement entered into by three "parties," each one of which faced a risk of catastrophic financial loss absent the settlement. A *class* of upwards of 150,000 future asbestos victims was freed from what the courts below found was the very real risk that Fibreboard might ultimately lose its coverage disputes with the insurers, which would have left all class members with no source of recovery and rendered all their claims worthless in practice. CA 52a, 75a-77a, 357a.* The *insurers*, in return for payment of over $1.5 billion, were

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* As used in this brief, "CA" refers to the appendix submitted with the petition for certiorari; "JA" to the joint appendix; "Fib. App." to the appendix to the brief in opposition filed by Fibreboard; "Br." to petitioners' brief; "Class Br." to the brief filed by the Plaintiff Class; "Class BIO" to the brief in opposition filed by the Plaintiff Class; and "5th Cir. JA" to the joint appendix in the Fifth Circuit.

released from potentially open-ended and unprecedented liability on the insurance policies, which — while strenuously disputed — left a cloud over both companies until resolved. And *Fibreboard*, having successfully secured from its insurers the availability of real and fair compensation for those persons injured by exposure to the asbestos products it had manufactured, ensured the continued viability of the company for its employees, other creditors and owners.

Strikingly, petitioners do not contest the financial fairness of the Settlement. For all the myriad objections they advance, petitioners have never challenged the District Court's finding, confirmed by the Fifth Circuit, that the Global Settlement is fair as well as "far preferable" to *any* other practical alternative. CA 360a, 366a. Moreover, for all petitioners' professed solicitude for class members, they ignore the lower courts' finding that, *absent* the Global Settlement, those very class members would face a "significant risk" that their only source of meaningful compensation — the disputed insurance — would be lost. CA 52a, 357a; *see* pp. 15-16, *infra*. And finally, petitioners also ignore the District Court's finding that the risk to the class posed by the coverage disputes could be resolved "only" through a unitary resolution involving the class, that "[r]esolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised." CA 232a, 241a, 490a; *see* pp. 16-19, *infra*.

Instead, petitioners simply ignore these findings and choose to create their own preferred "facts," painting a picture in which the class actually had "unlimited" insurance at its disposal and in which the Global Settlement was actually a "gratuitous" infliction on a class that had no reason at all to enter into a settlement. *E.g.*, Br. 2, 9 n.9. They then invoke a series of purported categorical "rules" that they contend under those circumstances bar a class settlement. As shown below, petitioners have contrived both their presentation of the case and these supposed rules out of whole cloth: the risk of the coverage disputes and the need for a unitary class settlement were real indeed; and, under well-established rules of law, the

lower courts' approval of this indisputably fair Global Settlement was correct in all respects.

II. Background

A. The insurance coverage disputes.

Fibreboard, a company facing an overwhelming number of asbestos claims — both present and anticipated — had less than $250 million in non-insurance assets, an amount manifestly insufficient to satisfy even a fraction of its liabilities to the class. CA 38a, 42a, 377a. Indeed, by 1993, when the Global Settlement was negotiated, these assets were dwarfed by more than $1.2 billion in unpaid settlement obligations to *prior* asbestos claimants, thus leaving virtually *nothing* for future claimants. CA 42a. Fibreboard did, however, have two potentially very valuable insurance claims, on which rode both Fibreboard's corporate survival and class members' chances of obtaining any meaningful recovery.

These insurance claims arose from two policies allegedly issued by Continental and Pacific for a period of less than three years back in the 1950s. CA 38a. *First*, although it could not actually locate any copy of the policy, Fibreboard claimed that Pacific had insured it for one year from 1956-57, and that this policy had a $500,000 per-claim limit but no aggregate limit on total coverage. CA 267a. *Second*, Continental in 1957 had issued a three-year policy to Fibreboard for a premium of less than $10,000 per year — which policy, however, was cancelled by Fibreboard in March 1959 after only 22 months. The policy had no aggregate limit on coverage, but did have both a $1 million "per-occurrence" limit and a $500,000 "per-person" limit. CA 38a, 267a. Fibreboard claimed coverage that the insurers disputed.

In 1979, Fibreboard sued the insurers on these policies in California state court. Because the great majority of the asbestos claims against Fibreboard arose out of (i) exposures *prior* to the 1956-59 policy periods and (ii) diseases that (as a result of long latency periods) did not become manifest until long *after* those years (CA 254a, 260a-61a), any interpretation

of the policies that required *either* "exposure" or "manifestation" of disease to have occurred *during* the policy years would have done Fibreboard (and class members) very little good. Accordingly, Fibreboard argued in this coverage case that the two policies provided coverage for each of hundreds of thousands of claimants whose first exposure to asbestos preceded March 1959: even if *none* of the exposure actually took place during the 1956-59 policy years; and even if manifestation of the diseases did not occur until many years after the expiration of the policies. CA 39a, 268a. And Fibreboard maintained that, without an aggregate limit, there was no ceiling to the insurers' liability. Thus, to succeed on its claims, Fibreboard needed to prevail on each and every one of the following issues.

First, in the original coverage case, Fibreboard needed to establish:

- that the policies should be read to cover all claimants exposed to Fibreboard asbestos at *any* time prior to March 1959 — *i.e.*, at any time in the decades going back to the 1930s and even if the disease did not appear until decades after the policies had terminated. CA 268a.*
- that the "scope" of coverage should in no way be pro-rated to reflect the short period of time in which the policies were in force, but instead extended to the *full* amount of Fibreboard's liability and defense costs for exposures during all the many years prior to the

* To obtain such a "continuous trigger" ruling, Fibreboard needed the court to reject federal precedents holding that coverage under asbestos insurance policies was triggered only where the claimant's *exposure* took place during the policy period (an "exposure" trigger) or where the claimant's disease *appeared* during that period (a "manifestation" trigger), approaches that would have either curtailed Fibreboard's claimed coverage or eliminated it altogether. *See, e.g., Ins. Co. of North America v. Forty-Eight Insulations*, 633 F.2d 1212, 1218-23 (6th Cir. 1980) (exposure trigger); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 25 (1st Cir. 1982) (manifestation trigger); *see also Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E.2d 150 (Ill. 1987).

policies' termination — even though the policies were in force for only a small fraction of that time. CA 268a.*

- that the $1 million "per occurrence" limit under the Continental policy — and the policy's definition that "[a]ll . . . exposure to substantially the same general conditions existing at or emanating from each premises location shall be deemed one occurrence" — somehow did *not* limit coverage to $2 million (one "occurrence" for each of the two Fibreboard asbestos plants) or even to one "occurrence" for each shipyard or construction site at which Fibreboard asbestos was used. Instead, Fibreboard needed to persuade the court that — notwithstanding the policy's independent $500,000 "per person" limit — "occurrence" meant each *individual person's exposure to asbestos*. CA 269a.
- that unique language in the Continental policy should not be construed to require a "double anchor" — *i.e.*, to limit coverage to claims where both the "exposure" *and* "manifestation" occurred during the policy period. CA 270a.
- that the "missing" Pacific policy had actually existed and contained no aggregate limit on coverage. CA 268a.

* Thus, per Fibreboard, even if the Continental policy had been terminated by Fibreboard after 22 minutes or 22 days — rather than 22 months — at the very moment the policy came into existence, Continental had *eo instante* assumed *full* liability for all the hundreds of thousands of claimants who had been exposed to asbestos in *all* preceding decades, notwithstanding that a plaintiff's disease did not manifest itself until after the policy had been terminated. On this point as well federal precedent had gone the other way. *See, e.g., Ins. Co. of North America v. Forty-Eight Insulations*, 633 F.2d at 1224-25; *Gulf Chemicals v. Associated Metals & Min. Corp.*, 1 F.3d 365, 371-73 & n.4 (5th Cir. 1993) (citing cases).

Second, during the 14 years in which these issues were pending before the California courts in the original coverage case, Fibreboard's coverage claims were placed in additional jeopardy for new and separate reasons. During that period, Fibreboard — devoid of cash with which to deal with pending asbestos claims, and concededly in part as a device to pressure Continental to the table — began a massive program of "assignment" settlements. CA 40a, 292a; *see* Class Br. 6-7. Fibreboard proceeded to "settle" with tens of thousands of asbestos plaintiffs by paying them no money of its own, but simply by assigning to them hundreds of millions of "Continental dollars": agreed-upon "settlement" amounts (more than double previous settlement norms) that the claimants would then collect from *Continental* if Fibreboard prevailed in the coverage litigation. CA 40a-42a. Continental, for its part, strenuously disputed Fibreboard's right to make such "assignment" settlements without its consent, and claimed them to constitute a major breach of the underlying insurance policy forfeiting any coverage that Fibreboard might otherwise be able to establish. CA 287a-88a. This "assignment" dispute touched off a separate round of litigation, beginning with a case in California state court entitled *Andrus v. Fibreboard*. CA 41a. Fibreboard, thus, needed to prevail in this "assignment" dispute as well.

Initially, Fibreboard was successful in each of these litigations. In 1990, 11 years after the case was brought, the coverage-case trial court issued a judgment almost entirely in Fibreboard's favor. CA 39a, 268a-69a. In 1992, the *Andrus* trial court upheld Fibreboard's claim that it was entitled to enter into assignment settlements without Continental's consent. CA 41a. These rulings exposed the insurers to unquantifiable, uncapped liability, and appeals were taken to the California Court of Appeal. In the coverage case, successive oral arguments were held over a period of months in 1993, the last on August 27, 1993, the same day that an agreement in principle on the Global Settlement in this case was finally reached.

CA 270a.* The separate *Andrus* appeal was not argued until October 1994.

B. Efforts to resolve the coverage dispute on a *non*-unitary basis fail.

Fibreboard and the asbestos plaintiffs were keenly aware of what the District Court and the Fifth Circuit in this case found to be the "significant risk" that Fibreboard would lose all or most of its claimed coverage in these appeals. CA 52a, 75a, 357a; *see* pp. 15-16, *infra*. For their part, the insurers were quite cognizant of the enormous risk that potential unlimited liability posed to them. CA 75a. As a result, Fibreboard, the insurers and the asbestos plaintiffs all attempted separately to find ways to resolve the disputes. Years of efforts toward non-unitary, piecemeal solutions involving different subsets of the parties, however, totally failed to produce a resolution.

First, Fibreboard tried to get Continental to settle directly with *it*, without the direct participation in the settlement of the asbestos plaintiffs. But although Fibreboard and Continental repeatedly discussed a direct "bilateral" settlement beginning in 1988, as late as the summer of 1993 — with the potential final argument in the coverage appeal only two months away — they were not even close on price: Fibreboard demanding a sum sufficiently "cushioned" to ensure its survival in the face of continuing asbestos claims and defense costs, and Continental insisting that the settlement amount should be at a significant discount to Fibreboard's projected liabilities to reflect the substantial issues that existed with respect to coverage. CA 282a, 301a, 314a, 330a; Fib. App. 18a, 32a-34a. As counsel for both parties testified, and as the District Court found, it "was very clear" that there was "no chance" of a separate Continental-Fibreboard deal under these circumstances. JA 76a-77a, 227a; CA 232a, 330a.

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* Because any further review of the appellate court's decision would be discretionary with the California Supreme Court, all parties needed to assume that the appellate court's decision could be final.

Second, Fibreboard attempted to use the assignment program as a means by which it could conceivably accomplish an overall settlement with the *class plaintiffs* — without the participation of the insurers. It thus proposed to the leading members of the asbestos plaintiffs' bar a "global" class action settlement-by-way-of-assignment, under which class members would look to an "assigned" overall amount from *Continental* were Fibreboard to prevail in the coverage litigation. CA 41a.* Although negotiations for such an "assignment" global settlement continued over a period of two years from 1991-92, they ultimately proved unsuccessful. CA 300a-01a. The major problem was that neither side could develop a workable solution for addressing the problem of opt-outs from the class. *Id.*

Finally, there was no prospect at all of a settlement involving the insurers and the class plaintiffs without Fibreboard's participation — since *Fibreboard* owned the policies. Indeed, the plaintiffs refused to negotiate with the insurers without Fibreboard's participation, and Fibreboard had actually procured a contractual pledge as part of "assignment" settlements that no plaintiff-Continental negotiations would take place without its participation. CA 42a, 301a.

C. Negotiations toward a unitary Global Settlement take place and ultimately succeed.

Fibreboard's assignment program spawned a series of actions by which Fibreboard sought court orders validating particular assignments.** By far the largest of these actions, involving an assignment settlement of over 20,000 claims for over $200 million of Continental's money, was brought by Fibreboard in the Eastern District of Texas in January 1993. CA 42a, 302-03a.*** Faced with the uncertainty of the outcome of this

* Fibreboard and the class plaintiffs also hoped that the prospect of such a global "assignment" settlement would still further increase pressure on Continental. CA 41a-42a; *see* Class Br. 8-9.

** The assignment settlements were conditioned on Fibreboard's obtaining such court orders. Class Br. 6.

*** Although the *Andrus* trial court had by this time issued its ruling validating Fibreboard's right to make assignments, that ruling was on

massive action, with the threat of a multi-billion-dollar global "assignment" settlement and with the appellate argument in the coverage case appeal looming, Continental decided to change course. At a March 1993 pre-trial conference before the District Court, Continental announced that it would be willing to settle, but only as part of a global resolution involving both Fibreboard *and* the class plaintiffs. With all parties' approval, the District Court appointed a mediator (Judge Patrick Higginbotham) to assist in ensuing discussions. CA 43a, 304a.*

The parties then began intensive negotiations toward a global settlement. As detailed more fully in the Plaintiff Class's brief and in the District Court's findings of fact (CA 305a-19a), these negotiations were hard-fought and marked by numerous break-downs and walk-outs by various parties. With Judge Higginbotham's active assistance, however, the parties gradually cleared away impediments to a settlement:

- In April 1993, in return for Fibreboard's agreement to cease its assignment program and to permit Continental to negotiate directly with the class plaintiffs, a critical threshold agreement was reached whereby Continental agreed that the cost of any global settlement would be borne entirely by the insurers and that

appeal, and under California law was therefore not entitled to preclusive effect. Moreover, the reasonableness of the settlement values in each particular assignment settlement had to be determined separately.

* These *facts* totally belie petitioners' insinuation that the District Court injected itself into the dispute "before a lawsuit was even filed." Br. 3. Before taking a single action with respect to the negotiations that led to the Global Settlement, the District Court had before it a case: (a) asserting the rights of over 20,000 asbestos claimants to the proceeds of Fibreboard's claimed insurance; (b) whose filing was concededly intended by Fibreboard and the claimants to pressure the defendant, Continental, into seeking an overall resolution of Fibreboard's asbestos exposure; and (c) where Continental had informed the court that it would be willing to settle only as part of such an overall resolution. CA 42a-43a. And even then, the District Court did not itself participate in the negotiations, but rather appointed a separate mediator to assist the parties. *Id.*

Fibreboard would not have to contribute any of its non-insurance assets to such a settlement. CA 308a-10a.

- In June 1993, plaintiffs' counsel — having received and reviewed legal analysis supplied by Continental to Judge Higginbotham that a non-opt-out class was legally permissible, as well as essential, given the particular circumstances of the case; and having seen their prior efforts with Fibreboard toward a global "assignment" settlement founder on an inability to solve the problems presented by opt-outs — moved off of their initial negative position and agreed that when negotiations resumed, it would be on the basis that a global settlement would be a mandatory one under Rule 23(b)(1)(B). CA 312a-15a.
- In July 1993, Judge Higginbotham advised the parties that his observations of the negotiations had persuaded him that a single settlement involving both "present" and "future" claims was "too complex," that a potential class settlement should be limited to future claims only, and that Continental should first settle the pending claims separately. In this way, those settlements could then be used as a benchmark for negotiating the price of the "futures" class settlement. CA 44a, 316a-18a.
- By August 5, 1993, Continental — pursuing this recommended course — had renegotiated Fibreboard's principal "assignment" settlements of pending claims into Continental-approved settlements. CA 318a-19a.

On August 9, 1993, with these issues resolved — and with final argument in the coverage case appeal now less than three weeks away — Judge Higginbotham by formal letter to the District Court requested the designation of Messrs. Rice, Cox, Kazan and Wartnick to negotiate toward a global settlement, a request that was honored by the District Court. CA 45a, 320a. The intense negotiations that ensued are described in the Plaintiff Class's brief. Class Br. 11-12. Finally, at midnight on the night of August 26, 1993 — with the coverage case appeal to be

argued in California the following morning — the parties reached an apparent agreement in principle on a $1.535 billion settlement amount for a Global Settlement. CA 46a.

The next morning, however, class counsel pressed a final condition: the class would not enter into the Global Settlement unless Fibreboard and the insurers separately entered into a "back-up" "Trilateral" settlement of the coverage disputes to operate in the event that the Global Settlement were successfully challenged. CA 46a.* Consistent with Fibreboard's and Continental's longstanding inability to agree on any such settlement (*see* p. 7, *supra*), however, Fibreboard and the insurers were sharply divided over the price of such a "back-up" arrangement. The insurers adamantly refused under a Trilateral agreement to fund Fibreboard for its exposure to "futures" claims for one dollar more than they had agreed to pay for those claims under the Global Settlement; Fibreboard, by contrast, insisted that it needed far more both to "cushion" it sufficiently to ensure its survival in the face of that exposure and to pay for the massive litigation costs it would face defending claims in the tort system. Ultimately, Fibreboard was forced to yield to the insurers' position as to such a "back-up" agreement — but only, as the District Court found, as the price for obtaining the class's entry into the Global Settlement. CA 330a.**

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* "Trilateral" because the parties would be Fibreboard, Continental and Pacific.

** The amount of this "back-up" Trilateral Agreement was ultimately set at $2 billion, reflecting the $1.525 billion the insurers were to pay to the "futures" class under the Global Settlement plus an additional amount necessary to resolve certain still-unsettled present asbestos claims that, under a Global Settlement regime, were to be resolved separately by the insurers. CA 354a-55a, 361a-62a.

This Trilateral Agreement was conditional on issuance of a final judgment that, in pertinent part: (a) certified a virtually *identical non-opt-out futures class of asbestos claimants*; and (b) declared that the Trilateral Agreement represented a fair settlement of the coverage dispute and cut off any rights class members might have under the insurance policies. Br. 4 n.6. That judgment was issued in a companion case below (*Continental Cas. Co. v. Rudd*) — a judgment that was supported both by

III. The Global Settlement and subsequent procedural history.

The Global Settlement resolves the risks that the coverage disputes posed to the class, to Fibreboard and to the insurers, and it does so on terms that not even petitioners claim are unfair to the class. It transforms the disputed insurance coverage into over $1.5 billion cash and transfers it to independent Trustees for the class's benefit, for distribution to class members in accordance with procedures that will minimize delays and will maximize the amount of money class members actually receive, by capping claimants' attorney's fees at 25% (well below the 33-40% norm) and by dramatically reducing the costs of defense. CA 49a, 362a-366a.

Equally important, however, is what the Global Settlement does *not* do: it does *not* set individual class members' recoveries or deprive individual class members of recourse to the tort system. CA 58a & nn.7-8. Individual recoveries will instead be set on an individual basis as the claims arise. Individual class members may resolve their claims consensually with the Trust through *non*-binding negotiation, mediation or arbitration — a process in which the Trust is required to take into account all individual characteristics of the claim at issue. And if individuals are dissatisfied with their proposed recovery for any reason, they have the absolute right to exit into the tort system to litigate their claims, with the Trust substituting for Fibreboard as the defendant. CA 50a, 346a.

After the District Court preliminarily approved the Global Settlement in July 1994, the settling parties implemented, at a cost of more than $18 million, the most comprehensive notice campaign ever conducted in a class action. CA 462a. This campaign included: (i) over 200 national television advertisements

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petitioners and by the same judge who so vehemently dissented from the approval of the Global Settlement as illegitimately certifying the same non-opt-out class. Certiorari was not sought as to that judgment. As detailed at pages 19-21 below, petitioners' assertions that the Trilateral Agreement "moot[s]" the risk to the class (Br. 2 n.3) are flatly contrary to the record.

and almost 3,000 additional television spots in 72 of the media markets most likely to contain class members, advertisements which in combination were estimated to have reached 94.2% of the nation's television households an average of 5 times each; (ii) 286 newspaper advertisements in 151 markets, and 171 follow-up ads in the 72 "targeted" markets; (iii) additional newspaper ads in 21 foreign countries; (iv) further advertisements in other publications with an aggregate circulation of well over 100 million; and (v) advertisements in 25 national and international labor publications. CA 460a-62a. Beyond this, 1.4 million notice packages were then sent out, including to 175,000 present and former employees of 209 companies where significant numbers of asbestos claims had arisen and to 2,470 plaintiffs' lawyers who had previously represented asbestos plaintiffs. CA 460a, 463a.

Following this unprecedented notice campaign and broad rights of discovery exercised by petitioners, the District Court conducted an eight-day live fairness hearing featuring testimony by 18 witnesses, hundreds of exhibits and full procedural rights afforded to petitioners. This hearing included not only detailed testimony on the negotiations leading up to the settlement, but also extensive expert testimony as to the potential outcomes of the coverage disputes, projections of the number of future asbestos claims against Fibreboard, the relative benefits to the class of the Global Settlement as compared with the alternatives (including the Trilateral Agreement) and ethical issues raised by petitioners. CA 272a-76a, 356a-60a, 392a-96a. The District Court also received a detailed report from a Guardian Ad Litem (Professor Eric Green) it had appointed to conduct an independent review of the Settlement from the standpoint of the class, setting forth the guardian's determinations that that Settlement was fair and superior to all alternatives and recommending that it be approved. CA 431a-42a. Despite the provision of notice to millions of persons (and to thousands of asbestos plaintiffs' lawyers), fewer than 30 objections to the Settlement were received. CA 348a.

In July 1995, the District Court issued comprehensive findings of fact, conclusions of law and an extensive opinion approving the Global Settlement, finding that the Global Settlement is fair to the class, and indeed represents a "far" superior outcome for the class than any practical alternative, including the "back-up" Trilateral Agreement. CA 241a-242a, 366a-367a. The Fifth Circuit affirmed the District Court's findings, conclusions and opinion, with one judge dissenting. In an extensive opinion, the court rejected each of the objections petitioners had raised, including their claim that the District Court's judgment was at odds with the Third Circuit's decision in *Amchem* (then named *Georgine*). Recounting in detail the "stark contrast" between this case and *Amchem*, the Fifth Circuit held that the class here was valid despite its "like[ly] agreement" — correctly anticipating this Court's eventual holding — that the *Amchem* class was not. CA 57a-58a & n.8.

After this Court issued its opinion in *Amchem*, it remanded this case to the Fifth Circuit for further consideration in light of *Amchem*. The Fifth Circuit ordered extensive briefing on the issue, and again heard full oral argument. Thereafter, it reaffirmed its prior findings and conclusion regarding the "controlling differences between this case and *Amchem*," the same judge once again dissenting. CA 2a.

IV. Petitioners' distortion of the uncontested record.

Petitioners, however, completely ignore the findings of the courts below, and instead portray this case in a manner diametrically opposed to those findings. Without even making an effort to document their claims in the record, petitioners simply proclaim that the insurance available to the class was "unlimited" and not subject to serious challenge (Br. 2, 24-26); that the insurers and Fibreboard nonetheless effectively bribed "several cooperative" plaintiffs' lawyers into agreeing to a mandatory class settlement that the class had no reason to enter (Br. 3, 6, 41, 44); and that the "significant limitations" the Global Settlement supposedly places on the class are thus "entirely gratuitous." Br. 8-9 & n.9. This highly inaccurate

presentation — which is apparently intended to obscure the fact that, under petitioners' version of the law, there was simply *no way* for the class to protect itself against the risk of the coverage disputes — was roundly rejected by both courts below.

1. *The class did not have "unlimited" insurance.* — The premise of petitioners' entire brief — the blithe assertion that the class had access to "an *unlimited* insurance fund" prior to the Global Settlement (Br. 2 (emphasis in original)) — is patently false. Indeed, the assertion has been invented for the first time in this Court. Before the Fifth Circuit, petitioners expressly conceded that "the overwhelming consensus of all informed counsel" is that the now supposedly "unlimited" insurance fund was in fact subject to very serious risk, reciting at length the evidentiary record that the risk that Fibreboard could lose the coverage dispute was "significant," "dire" and "grav[e]." Fib. App. 8a-9a.*

The findings of the courts below could not be clearer. The District Court assessed Fibreboard's prospects of prevailing in the coverage case appeal, viewed as of the time both of the agreement-in-principle and of the fairness hearing.** Based on

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* This concession came in an *amicus* brief that petitioners filed in the Fifth Circuit in the companion *Rudd* action supporting the District Court's judgment approving the "back-up" Trilateral Agreement. As discussed below, that Agreement provides far *less* insurance funds to the class. *See* pp. 19-21, *infra*. If petitioners in fact believed their own rhetoric before this Court that the insurance was "unlimited," they obviously could never have supported the Trilateral Agreement.

** By the time of the fairness hearing, the following developments in the coverage case had occurred: (1) the appellate court, in light of the Global Settlement, had severed out and reserved decision on three issues described above — the Continental "per-occurrence" and "double anchor" issues and the "missing Pacific policy" issue — that were not germane to the other parties to the appeal (which was a consolidated proceeding involving dozens of other insureds and insurers); (2) the appellate court had proceeded to decision upon and largely affirmed the trial court's rulings in favor of Fibreboard's position on the "trigger" and "scope" issues, which *were* presented by other parties to the consolidated appeal; and (3) the California Supreme Court had granted review of this decision on

the evidence before it, including expert testimony of retired Justice Marcus Kaufman of the California Supreme Court and Professor George Priest of Yale Law School — evidence that petitioners did not contest or challenge in any way — the District Court found that there was a "significant risk" that Fibreboard's trial court victory would be substantially or entirely undone on appeal, either by the appellate court or the California Supreme Court. CA 231a, 272a-76a, 357a. The Fifth Circuit affirmed this finding in all respects. CA 75a.*

Moreover, the District Court further found — in findings that petitioners likewise do not contest — that this already "significant risk" to Fibreboard's claimed coverage was compounded by the assignment settlement dispute. Indeed, by the time of the fairness hearing, the California Court of Appeal had reversed the *Andrus* trial court, ruling that Fibreboard in fact had *no* right under the Continental policy to enter into "assignment" settlements. CA 379a; JA 485a. As the District Court found, "no one disputes" that there was accordingly now a further "significant risk" that Fibreboard "might lose its insurance coverage" as a result of this ruling even if it otherwise prevailed in the coverage case itself. CA 52a, 231a.

2. *Resolution of the coverage dispute required a unitary class settlement.* — Similarly baseless is petitioners' pronouncement that there was no "need for the personal injury claims [of the class] to be 'bundled' with [an] insurance settlement," and that the class's entry into a mandatory class settlement was instead procured by "negotiating strategies" of

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the "trigger" and "scope" issues on a "grant and hold" basis pending its decision of similar issues in another case. CA 271a-72a.

* After the District Court's determination, the intermediate appellate court, acting on remand from the California Supreme Court, reaffirmed its earlier decision on the "trigger" and "scope" issues, and the Supreme Court denied review. *Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr.2d 690 (Cal. App. 1996). The remaining issues — including the Continental "per-occurrence" and "double anchor" issues and the "missing" Pacific policy issue — are still being held in abeyance by the appellate court.

Fibreboard and the insurers that succeeded in buying off supposedly compliant class counsel. Br. 41. The District Court categorically rejected these assertions, summarizing the record as demonstrating that the "significant risk[s]" to the class posed by the coverage dispute could be resolved "*only*" through a non-opt-out, unitary settlement encompassing all claims: that "[r]esolution of the insurance dispute required a unitary settlement in a proceeding in which *all* claims were compromised" and that "[t]he need to protect Class members' common interests in the insurance proceeds subject to the coverage dispute demand[ed] a unitary resolution." CA 231a-232a, 241a, 490a (emphasis added).

This finding is amply borne out by the parties' multiple unsuccessful efforts at a piecemeal resolution during the course of a 14-year coverage dispute, notwithstanding intense pressure to achieve a resolution. *See* pp. 7-8, *supra*. As the record shows, the unworkability of a piecemeal solution was a product not of "negotiating strategies," but of what the courts below found were the economic realities that each party faced.

From *Fibreboard's* perspective, its coverage claims were the only thing that stood between it and insolvency: it believed it would remain a viable company *if* it prevailed in the coverage disputes; it would be immediately bankrupt if it lost. CA 78a-79a, 357a-358a. Accordingly, it was not about to settle those disputes on terms that would still leave it facing likely bankruptcy. Thus, from Fibreboard's standpoint, any settlement of those disputes either had to (a) be so financially cushioned that there was no real risk that future asbestos liabilities and defense costs would place its corporate existence in jeopardy, or (b) involve the asbestos plaintiffs, thereby resolving its overall future liability. CA 330a, 374a-75a.

The *insurers*, for their part, were certainly willing to put enormous funds on the table to rid themselves of the potential no-limit exposure claimed by Fibreboard. But they were not willing to forgo their substantial arguments disputing coverage — on which they had a significant chance of escaping any liability at all — by giving Fibreboard the "cushion" necessary to

place its survival beyond question. CA 330a. Nor were they in a position to settle the coverage disputes and pay the enormous sums thereby entailed and still be left with unquantifiable potential additional liabilities to opt-out plaintiffs. CA 43a-44a, 306a-07a, 378a.* Contrary to petitioners' insinuations, this was not an arbitrary "negotiating strateg[y]" by the insurers. As noted above, the global "assignment" settlement discussions between Fibreboard and the plaintiffs — in which the insurers had *not* participated — had foundered precisely because of an inability to devise a workable means of dealing with opt-outs. *See* p. 8, *supra*. And indeed, the prospect of opt-outs was even more unworkable at the time of the Global Settlement negotiations, since the timing of the coverage case appeal before the California court would have entailed giving class members the right to opt out of a global settlement *after* the outcome of the appeal was known, and hence a one-way option on the settlement terms. CA 44a, 306a-07a. Thus, from the insurers' standpoint, any settlement of the coverage disputes had to involve *all* the asbestos plaintiffs.

The situation facing the *class* was thus simple. The insurers and Fibreboard had shown over the course of 14 years of litigation that they were unable to reach a settlement of the coverage disputes without involving the asbestos plaintiffs. For that very reason, however, the class had enormous negotiating leverage over both the insurers and Fibreboard, each of which faced catastrophic risk if the coverage disputes continued. Those parties were consequently offering the class over $1.5 billion for a global settlement, an amount that was indisputably a fair resolution of their claims. CA 98a, 359a-361a. The class could either secure that enormous insurance fund, or run the significant risk of losing the prospect of recovery

* Although the amount of the settlement was obviously of importance to the insurers, the indispensable element from a corporate reporting point of view was to remove uncertainty and quantify their Fibreboard exposure with finality — something that could not be achieved if opt-outs were allowed. JA 213a.

entirely by pressing forward with a quixotic pursuit of what remained of Fibreboard's non-insurance assets.

3. *The Trilateral Agreement does not solve the class's problems.* — Nor, contrary to petitioners' claims, does the Trilateral Agreement show that Fibreboard and the insurers were able to settle the coverage disputes "independently" and that "[t]he Global Settlement was not necessary to overcome [the] stumbling block[s]" to such an independent settlement. Br. 4, 9 n.9. To the contrary, as detailed above, the District Court found and the record is uncontroverted that Fibreboard acceded to the Trilateral Agreement *only because* it was the price of obtaining a unitary resolution through the Global Settlement and *only because* it was merely a contingent "back-up" to that unitary resolution. *See* p. 11, *supra*.* The record thus totally belies petitioners' version of events.

Likewise, petitioners badly misrepresent the record in portraying the Trilateral Agreement as having "mooted" the risk of the coverage dispute to class members by providing Fibreboard with enough money "to resolve all of" its liabilities to the class and to "survive indefinitely, perhaps forever." Br. 4 n.6, 9. As the District Court found, Fibreboard would have to use the Trilateral money to pay a host of claims and

* Petitioners' sole effort to deal with this fact — that, as the District Court found, the coverage dispute could be settled "only" through a unitary resolution involving the class (CA 241a) — is a mischaracterization of the testimony of Fibreboard's counsel. They quote counsel as having stated that, at one point, Fibreboard would have settled directly with the insurers (without the plaintiffs' participation) for $3.2 billion, an amount less than the insurers ultimately agreed to pay under the Global Settlement to resolve future claims and to separately resolve present claims. Br. 9 n.9. What petitioners omit is that Fibreboard's $3.2 billion number was *before* developments (notably, the July-August 1993 renegotiation of "assignment" settlements of pending claims described above) that *increased* the value of both present claims and the ultimate future global settlement. Class Br. 10-11. Accordingly, Fibreboard's counsel went on to testify that — when, in response to these developments, the insurers raised their offer to $3.2 billion — there was "no way" that Fibreboard would have agreed to that number to settle without the plaintiffs' participation. JA 111a-12a.

other liabilities *in addition* to those advanced by class members, including (as noted above) unsettled pending asbestos claims not within the class and the enormous defense expenditures entailed in litigation. *See* p. 11n.**, *supra*; CA 361a-362a, 354a-355a. As a result, the findings below are clear that the Trilateral Agreement is "far" inferior to the Global Settlement from the class's standpoint and does *not* provide enough money to guarantee payment, full or partial, to class members. CA 73a, 240a, 358a-359a, 361a-366a.

Thus, the record is *uncontested* that the class would in the aggregate receive "at least" several hundred million dollars *less* under the Trilateral than under the Global Settlement, and a significant number of class members could well receive *nothing* at all. CA 358a-359a, 361a-362a. The expert testimony at the fairness hearing laid this out in detail: the class would receive $234-477 million *less* under the Trilateral than under the Global Settlement. 5th Cir. JA 114 at 67; 5th Cir. JA 124; 5th Cir. JA 7 at 2054-57. As a consequence, that testimony continued — whereas under the Global Settlement it was more probable than not that *all* future claimants would receive fair and appropriate compensation (CA 359a) — under the Trilateral *41-50%* of the class, between *104,000* and *127,000* asbestos claimants, would likely be left *unpaid*. 5th Cir. JA 116-18; 5th Cir. JA 7 at 2058-60.* Indeed, as the Fifth Circuit put it, under the Trilateral, "Fibreboard would be unable to pay all the valid claims against it within *five to nine years*." CA 73a (emphasis added).**

* This expert testimony went totally uncontradicted by any evidentiary presentation by petitioners. And although the District Court was not prepared to adopt the precise numbers set forth by this testimony, it did agree that "the amount that would actually reach class members under the Trilateral Settlement would be at least hundreds of millions of dollars less than under the Global Settlement" and that "there is a significant risk that the Trilateral Settlement . . . would leave a 'late-comer' component of the [class] without compensation." CA 359a, 362a.

** Petitioners' reliance on snippets of Fibreboard statements about its prospects under the Trilateral (Br. 9) omits the facts: (i) that the District Court found on the complete record that it "c[ould] *not* adopt" the optimism expressed in those statements (although it credited that optimism as "genuine"); (ii) that Fibreboard *itself* went on to acknowledge that there was a "substantial risk" that the Trilateral money would *not* be sufficient to allow it to pay all its liabilities to the class; and (iii) that Fibreboard further made clear that the Trilateral money would be sufficient to allow it to survive only if it succeeded in reducing class members' recoveries to *one-half of current levels*. CA 358a-59a, 362a. Thus, even on these Fibreboard statements — whose optimism the District Court could not adopt in any event — class members would receive *far* less money under the Trilateral Agreement than under the Global Settlement, and there would be a substantial risk that many would receive nothing at all.

4. *Petitioners' criticism of particular terms of the Global Settlement is unfounded.* — Finally, petitioners' sniping about supposed "significant limitations" that the Global Settlement places on plaintiffs' recoveries is belied both by the record and by petitioners' own tacit concession of the Settlement's *overall* fairness to the class. For example, petitioners' repeated complaint that the Global Settlement does not deprive Fibreboard of its non-insurance assets ignores the fact that, as set forth above, Continental had contractually bound itself *prior* to the Global Settlement that insurance proceeds would fund the entire cost of any Global Settlement. CA 327a, 375a. It also ignores the fact that these were *Fibreboard's* insurance policies: settlement of liability covered by insurance is *ordinarily* paid by the insurer, not by the defendant itself. Similarly, petitioners' invocation of a series of hypothetical outer limits that the Global Settlement places on disproportionate windfall awards (Br. 8) ignores the District Court's finding that the limits reflect tort-system realities against Fibreboard and thus should have at most a minimal impact in practice on class members' individual recoveries. App. 372a-374a; *see* Class Br. 16-17.

More fundamentally, however, these complaints about isolated terms of the Settlement miss the forest for the trees. While in an ideal world it might have been desirable from the class's standpoint to have Fibreboard's $225-250 million in equity added to the Settlement (or for that matter, $225-250

million more from the insurers), or to obtain enough money to guarantee payment of hypothetical wild-card awards to all class members, this was a *settlement* in which each of the parties had to make concessions to achieve a resolution that avoided the very major litigation risks that otherwise confronted *each* of them. The important questions are thus whether the $1.535 billion the class was able to extract is fair and reasonable in light of the risks posed by the coverage disputes and the anticipated level of future claims, and whether receipt of that fund and resolution of those risks warrant the outer limits on recovery discussed above. Petitioners do not — and cannot — contest the lower courts' affirmative factual findings on either point.

Summary Of Argument

Given the undisputed fairness of the Global Settlement and the seriously adverse consequences of reversal to the class, petitioners bear a heavy burden indeed in this case. They must demonstrate that the Global Settlement is not provided for by the Federal Rules or is affirmatively precluded by something in the federal statutes or Constitution.

No such demonstration has been made. Petitioners are long on ringing proclamations of supposed rigid rules of law: Rule 23(b)(1)(B) class actions may *never* be certified unless there is a "limited fund"; bankruptcy was the *only* legally permissible option for the class; non-opt-out classes are *per se* unconstitutional where *in personam* monetary claims are involved; and adequate notice may *never* be given to future claimants. But they are virtually silent on the precedential basis for these supposed hard and fast rules. As detailed below, that is because the "rules" do not exist and because the certification of the class was completely proper under settled principles of law.

1. Petitioners do *not* dispute that non-opt-out class certification was authorized here by the plain language of Rule 23(b)(1)(B). Instead, their principal contention that certification of the class transgressed Rule 23(b) is predicated entirely on the notion that the Rule somehow contains an unstated "limited fund" requirement. This supposed requirement, however, appears nowhere (a) in the language of the Rule; (b) in the Rule's Advisory Committee Notes, which to the contrary specifically state that the Rule is to operate "in the absence of a fund either present or potential"; or (c) in any decided case. *See* Point I.A, *infra*.

2. Nor is there any basis for petitioners' follow-on claim that the Bankruptcy Code precludes the application of Rule 23(b)(1)(B)'s plain language in this case. As of August 1993, when the Global Settlement was reached, class members could *not* put Fibreboard into bankruptcy, at least without first requiring it to litigate and *lose* the coverage dispute. Petitioners must therefore point to *something* in the Bankruptcy Code stating that it bars the normally available procedures of Rule 23(b)(1)(B) — particularly in circumstances where class members could *not* invoke that Code as an alternative. Unsurprisingly, petitioners have not done so. *See* Point I.B, *infra*.

3. Equally without merit is petitioners' argument that the operation of Rule 23(b)(1)(B)'s plain language in this case violates Due Process and the Rules Enabling Act. Petitioners' proposed *per se* rule that would categorically foreclose the federal courts from achieving a unitary resolution whenever the class asserts *in personam* claims — no matter how draconian the consequences to the class — is at odds with this Court's precedents and hundreds of years of settled practice. Quite the contrary, these authorities recognize that there will, indeed, be situations in which the class needs such a resolution no matter whether its claims might be deemed *in personam* or *in rem*, and establish that the permissibility of a unitary resolution turns instead on whether it is necessary to protect the class. This is precisely the approach adopted by Rule 23(b)(1)(B)'s plain language, and there is no basis to hold that Rule unconstitutional or in violation of the Rules Enabling Act. *See* Point II, *infra*.

4. Finally, petitioners' alleged rule that adequate notice cannot be given to future claimants would effectively bar any class

actions embracing future claims and flies in the face of all precedent. This Court's seminal decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), definitively rejected this argument, as have innumerable cases thereafter approving class actions involving future schoolchildren, employees, prisoners, housing tenants and others. What these cases recognize instead is that there are numerous situations in which future claimants benefit from a class resolution designed to protect the rights they will eventually develop, and that due process thus requires only the best notice "reasonably possible or practicable" where future claimants are involved (*Mullane*, 339 U.S. at 317). *See* Point III, *infra*.*

Argument

POINT I

THE CLASS WAS PROPERLY CERTIFIED AS A MANDATORY CLASS UNDER RULE 23(b)(1)(B).

A. The plain language of Rule 23(b)(1)(B) requires a mandatory class on the facts of this case.

Petitioners' primary objection to mandatory class certification in this case is that the class cannot be certified under Rule 23(b)(1)(B) because there was no "limited fund" in this case. Br. 23-31. There is no merit to this argument.

1. This Court has repeatedly made clear that the Federal Rules are to be interpreted in accordance with the "plain meaning" of their language. *E.g*, *Business Guides v. Chromatic Comm. Enterprises*, 498 U.S. 533, 540-41 (1991) ("As with a statute, [the] inquiry is complete if . . . the text of the Rule [is] clear and unambiguous."); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 391 (1990); *Pavelic & LeFlore v. Marvel Enter-*

* Petitioners' arguments that the class does not meet the requirements of Rule 23(a) and that this action violates Article III are addressed in the brief filed by the Plaintiff Class.

tainment Group, 493 U.S. 120, 123 (1989). Rule 23(b)(1)(B) calls for certification of a mandatory class where:

> (1) the prosecution of separate actions would create a risk of
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair their ability to protect their interests.

In other words, individuals cannot opt out of a class where their doing so would risk significant prejudice to their fellow class members' claims: where allowing individual opt-outs would "create a risk" that other class members would "as a practical matter" suffer a "substantial[ ] impair[ment] . . . [of] their ability to protect their interests."

As the courts below found and as even the dissent below conceded (CA 73a, 132a-33a, 230a-33a), this case falls squarely within the Rule's plain language. As set forth above, failure by the class to file and maintain a class action to resolve the coverage disputes on a unitary basis — allowing class members instead to prosecute their claims separately — would have put class members to the "significant risk[s]" that Fibreboard would lose its claimed insurance as a result of the coverage disputes and that all (or virtually all) class members would be able to recover nothing on their claims. *See* pp. 15-19, *supra*; CA 76a, 230a-34a. Indeed, any separate action by any class member could have *itself* resulted in an adjudication that the insurers owed no coverage to Fibreboard: if a class member sought to have Fibreboard's liability paid by the insurers,* the insurers would have defended on the ground that they owed no coverage to Fibreboard; and any such action would create the "significant risk" of an adjudication in favor of the insurers, an adjudication that "as a practical matter" would

* The Continental policy, for example, expressly permitted tort plaintiffs to seek to enforce directly against Continental any judgment against Fibreboard. JA 411a.

clearly prejudice the class. *See* Advisory Committee Notes, 39 F.R.D. at 100-02 (Rule 23(b)(1)(B) certification appropriate where an individual adjudication — although "nominally affecting only one [class member]" and "not technically concluding the other members" — "might" nonetheless "do so as a practical matter" or have "practical effects" on the rest of the class).

Separate actions in this case, as the District Court found, thus presented a "risk" that class members would "as a practical matter" suffer a "substantial[ ] impair[ment] . . . [of] their ability to protect their interests" — by potentially denying them their only possible source of recovery for reasons unrelated to the merits of their claims against Fibreboard. CA 233a, 490a-91a.* As the Fifth Circuit put it, "[n]o one has contested th[is] finding, . . . probably because it is incontestable." CA 2a.

Contrary to the strawman set up by petitioners, this does *not* approve class certification on the basis of a "settlement fund" that is "limited only in the sense that literally every settlement is limited," thereby supposedly rendering "*every* settlement of class claims for money damages" eligible for class treatment under Rule 23(b)(1)(B). Br. 28 (emphasis in original). Rather, it holds that — as the Rule's language directs — 23(b)(1)(B) certification is appropriate where, absent a unitary resolution, the class's only source of recovery would potentially be lost for reasons *unrelated* to the merits of individual class members' underlying tort claims: for example, where (as here) the sole

* As set forth above, this risk exists as well under the Trilateral: the record demonstrates that, under that Agreement, the class as a whole will recover at least hundreds of millions of dollars less than under the Global Settlement and many class members will recover nothing at all. *See* pp. 19-21, *supra*. In any event, it would be inappropriate to use the Trilateral Agreement as the basis for denying class certification with respect to the Global Settlement. As shown above, the Trilateral Agreement would not have been agreed upon *but for* the parties' agreement to the Global Settlement. *See* p. 11, *supra*. To contend that the subsequent creation of this "far" inferior, back-up agreement precludes approval of the far *superior* Global Settlement would create a rule of law under which parties would be deterred from devising such alternate contingency arrangements — lest in so doing they invalidate what they believe to be the best resolution for all of them.

source of meaningful recovery for the class lies in a defendant's claimed insurance, but where that insurance is subject to a genuine dispute that the defendant has a significant chance of losing unless a unitary resolution is achieved. CA 233a.* As the District Court explained in dismissing petitioners' similar hyperbole below, this holding thus does *not* support the certification of a mandatory class "in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute" — in such a case, "if the settlement failed because [opt outs] were permitted, the defendant would retain the settlement funds (or the insurance coverage) and there might not be the 'impair[ment]' to class members' 'ability to protect their interests' required for mandatory class certification" by the language of Rule 23(b)(1)(B). CA 233a, 490a-91a.

2. Notwithstanding this Court's admonition that the Rule is to be given its "plain meaning," petitioners — beyond their patently false mantra that Fibreboard's insurance was "unlimited" and not subject to serious challenge — never address the Rule's language or dispute that a unitary resolution is called for here by that language. Instead, their entire argument is premised on the notion that the Rule somehow contains an *extra*-textual requirement that the class be asserting *in rem* claims against a "preexist[ing]" "limited fund." *E.g.*, Br. 27.

This supposed "limited fund" requirement, for which no authority is cited, is made up out of whole cloth.** It appears nowhere in the language of the Rule. It appears nowhere in the

* In a more candid moment, petitioners' counsel acknowledged exactly this, stating that the decision below does not "offer significant precedent for future . . . class actions" because it is "only precedent for a class action in the event there is a dispute between an insurance company and an insured where the insured would go insolvent otherwise. That won't occur very often." *Business Insurance*, August 5, 1996, at 38.

** Petitioners make the curious assertion that it is "undisputed" that Rule 23(b)(1)(B) requires a "limited fund." Br. 23 n.20. We cannot imagine where this supposed concession comes from. Petitioners cite only the dissent below — in which, as noted above, the dissenting judge *conceded*

Advisory Committee Notes — which, while alluding to a 'limited fund' situation as an *example* of the circumstances in which the Rule would operate, then immediately go on to state specifically that the Rule is to operate "in the *absence of a fund either present or potential*"; and which specifically cite as examples of cases falling *within* the Rule two of this Court's precedents upholding mandatory class resolutions *not* involving claims against a "limited fund." *See* 39 F.R.D. at 101 (emphasis added; citing *Smith v. Swormstedt* and *Supreme Tribe of Ben-Hur*, discussed more fully at page 36 below). And the supposed "limited fund" requirement likewise appears nowhere in the history underlying the Rule. As detailed below, this Court's precedents and settled common law practice instead employed precisely the approach subsequently incorporated in the Rule's language, making the propriety of mandatory class certification turn on whether there is a legitimate need for a unitary class resolution to protect the class rather than on whether the class is asserting *in rem* claims against a "limited fund" — and indeed making clear that the requisite need *does* exist where (as here) such a resolution is necessary to secure the entire class's source of recovery. *See* pp. 35-40, *infra*; *see also White v. National Football League*, 822 F. Supp. 1389, 1411 (D. Minn. 1993) ("[C]lasses under Rule 23(b)(1) may also be certified in cases involving claims for money damages in which no 'limited fund' exists.").

Nor have petitioners offered any reason for engrafting a "limited fund" requirement onto the Rule's plain language. As the facts of this case amply demonstrate, circumstances do

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that mandatory certification was appropriate as a matter of the Rule itself, and argued instead only that such certification violated constitutional and statutory requirements. CA 132a-133a. Moreover, petitioners' references to "limited fund" arguments that respondents did make in the courts below (Br. 26) carefully ignore respondents' 13-page principal argument below — that the Rule does *not* require a "limited fund" — and instead pretend that respondents' brief 2-page *alternative* contention that a "limited fund" in any event does exist here constituted a supposed concession that a "limited fund" is necessary. *Compare* Brief of Appellees, No. 95-40635 (5th Cir.), at 80-93 *with id.* at 93-95.

arise where class members would be profoundly prejudiced absent a unitary resolution whether or not the case involves *in rem* claims against a "preexist[ing]" "limited fund." Indeed, class members here were, if anything, *more* in need of a unitary resolution than are petitioners' hypothetical "limited fund" claimants: whereas a "preexist[ing]" "limited fund" would still exist absent a unitary resolution (albeit it might be distributed inequitably), here class members would otherwise face a severe risk that they would have no source of compensation *at all*. And as for petitioners' "sky is falling" predictions of abuse of mandatory class actions, Rule 23(b)(1)(B) and the underlying history delineate specific requirements for cases in which the need of class members is such that unitary resolutions are permissible. The appropriate way to prevent petitioners' exaggerated auguries is to require scrupulous adherence to the language of the Rule, not to adopt petitioners' approach of rewriting the Rule to declare certain types of cases categorically unfit for unitary class treatment, regardless of the potential consequences to the class in any individual case.

Accordingly, to affirm the decision below, this Court need not go so far as to say — as did the Fifth Circuit (and as has the Second Circuit as well) — that a tort defendant that lacks sufficient assets to pay all likely claims against it may be a "limited fund." CA 74a; *see also In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992).* It need only hold that in this case the significant risk posed by Fibreboard's coverage dispute to class members' only source of recovery foursquare satisfies the requirements of the plain language of the Rule — which petitioners do not dispute it does.

An amicus, the Trial Lawyers for Public Justice, also raises two further objections to 23(b)(1)(B) certification nowhere hinted at in the language of the Rule. *First*, the Trial Lawyers contend that this action cannot be certified under the Rule

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* Contriving yet another strawman, petitioners assert that the Fifth Circuit deemed Fibreboard's *non*-insurance assets — without its claimed insurance — as the "limited fund." Br. 24. This caricature is belied by any fair reading of the Fifth Circuit's opinion. CA 73a-74a.

because Fibreboard has not contributed its entire equity to the *settlement* of the action. TLPJ Br. 11. As the District Court put it, however, there is "no authority or reason" why a 23(b)(1)(B) class action, unlike any other action, may be settled only if "all of the defendant's resources are included within the settlement" (CA 233a-34a) — a rule of law that would as a practical matter force all contested 23(b)(1)(B) class actions involving monetary claims to be litigated to conclusion, since no defendant would settle on terms that leave it with no assets at all. Instead, as the District Court recognized (*id.*), the question raised where a mandatory class settlement does not include all of the defendant's assets is whether the settlement is *fair* — and neither the Trial Lawyers nor anyone else contends that the Global Settlement is not. *Second*, the Trial Lawyers insist that Rule 23(b)(1)(B) is transgressed because the class does not include *all* "tort claimants and creditors" against Fibreboard, including those whose claims have nothing to do with asbestos. TLPJ Br. 9. The Trial Lawyers, however, point to nothing in the Rule requiring that *all* potential creditors of whatever stripe be included in a 23(b)(1)(B) class. In particular, moreover, this action was brought to resolve Fibreboard's *coverage* disputes and class members' interests in the *insurance* policies — not to address claims against the company that fell outside of its claimed coverage. The class thus includes *only* those persons whose claims are arguably covered by the disputed insurance, and there was no need to include *other* creditors.*

* With the exception of "present" asbestos claimants, the class thus includes all persons who could be identified as having potential claims against Fibreboard that would arguably have triggered coverage under the policies. The Trial Lawyers' speculation that there are other "tort claimants" against Fibreboard with claims against "the insurance policies" (TLPJ Br. 9) fails to identify who those claimants might be or to explain how they might exist yet somehow be unknown to the parties 40 years after the expiration of the policies. Finally, although the claims of "present" asbestos claimants are settled separately and are not included within the class, no one contests the District Court's finding that these claimants were not treated more favorably than the class. CA 408a; *see* Class Br. 11, 41. Accordingly, the sole authority cited by the Trial Lawyers does not avail them: it stresses that "under-inclusiveness" is not "necessarily fatal to a class created under 23(b)(1)(B)," and holds only that a class may not be defined so as to "single out" class members "for special and possibly disadvantageous treatment." *In re School Asbestos Litig.*, 789 F.2d 996, 1006-07 (3d Cir. 1986).

B. Rule 23(b)(1)(B) certification in this case did not violate the Bankruptcy Code.

Despite their contention that application of Rule 23(b)(1)(B)'s plain language here illegitimately "circumvented" the Bankruptcy Code (Br. 37) — and that certification of the class in this case would "sanction[ ]" the Rule as "a general bankruptcy substitute" (Br. 30) — petitioners do not quarrel with one central fact: class members could *not* have put Fibreboard into bankruptcy in August 1993, when the Global Settlement was reached. CA 78a, 376a. Fibreboard was meeting its obligations as they came due at that time, and class members' contingent, future claims could not force it into bankruptcy. *See* 11 U.S.C. § 303(b)(1); CA 79a, 376a. Bankruptcy proceedings could instead have been reached only by forcing Fibreboard to litigate for, and *lose*, its claimed insurance, the only source of real recovery for the class. CA 76a-79a.* Such proceedings, as the Fifth Circuit put it, thus "would be too late for [class members]," who would get virtually nothing in bankruptcy if the insurance were lost. CA 78a-79a. Petitioners' suggestion, then, is that the class was required — *required* — to spurn $1.535 billion from the insurers and Fibreboard, and force Fibreboard to roll the dice in the coverage litigation: secure in the knowledge that, though the coverage might be lost, a bankruptcy proceeding in which class members would receive pennies on the dollar, if anything, would be waiting to "protect" them.

* Although Fibreboard had outstanding settlement obligations from prior cases far in excess of its non-insurance assets, those obligations — by virtue, in large part, of the assignment program described above — would not come due until *after* a resolution of the coverage litigation. CA 376a. As a result, only a loss of the coverage litigation would have rendered it insolvent immediately.

It is incumbent upon petitioners to point to *something* in the Bankruptcy Code that actually mandates this absurd course: some provision that dictates that the class had to await "catastrophe" in the coverage litigation (App. 77a); that suspends the normally available procedures of Rule 23(b)(1)(B) in the interim; and that does so even though the class could not actually invoke the Code's provisions as an alternative, but instead might only be able to do so at some point in the indeterminate future. Unsurprisingly, petitioners have identified no such provision. To the contrary, the only Code section that even remotely addresses this question expressly permits the district courts to sanction a resolution outside of bankruptcy where "the interests of creditors and the debtor would be better served" thereby. 11 U.S.C. § 305(a)(1).* (Indeed, the legislative history makes clear that this provision is designed to guard against just what is occurring here: to prevent a "few recalcitrant creditors" from holding up a fair and superior private resolution worked out outside of bankruptcy in order to "extract full payment" for themselves. H.R. No. 95-595, 95th Cong., 2d Sess., at 325 (1978).) And this provision has in fact been invoked in numerous cases to permit private arrangements between creditors and a debtor to proceed outside of bankruptcy.** If the Code thus does not prohibit private arrangements outside of bankruptcy even in certain situations where the creditors actually could have put the debtor into a bankruptcy proceeding, it *a fortiori* enacts no such prohibition

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* Petitioners badly distort the Fifth Circuit's opinion in contending that it relied on § 305(a)(1) as "a grant of authority" to "ignore" restrictions on its powers. Br. 38. What the Fifth Circuit actually — and quite properly — held was that this section refuted petitioners' claim that, in the circumstances of this case, the Bankruptcy Code divested the court of the *authority it otherwise possessed under Rule 23(b)(1)(B) and traditional practice*. CA 78a. One look at the plain language of § 305(a)(1) shows that the Fifth Circuit was clearly correct in this regard.

** *See, e.g., In re Colonial Ford*, 24 B.R. 1014 (D. Utah 1982); *Investment Corp. of America*, 39 B.R. 758 (S.D. Fla. 1984); *Win-Sum Sports, Inc.*, 14 B.R. 389 (D. Conn. 1981); *Luftek, Inc.*, 6 B.R. 539 (E.D.N.Y. 1980).

here, where the class could *not* have compelled a bankruptcy filing at the time of the settlement.

Thus, as the Fifth Circuit made clear, it is not necessary to hold that Rule 23(b)(1)(B) may always be invoked when a defendant is insolvent in order to affirm the propriety of the invocation of the Rule in this case. CA 76a-78a. There is *no* reason — and certainly nothing in the Bankruptcy Code itself — to bar application of the Rule on the facts here, where the class could not avail themselves of the Bankruptcy Code's provisions until some time in the indeterminate future and then only after *forfeiting* their only source of meaningful recovery.

For this reason, the sole provision of the Bankruptcy Code that petitioners actually do invoke (11 U.S.C. § 524(g)-(h)) simply illustrates the fallacy of their argument. That section — which was, in any event, not added until one year *after* the Global Settlement was reached — permits enforcement of an injunction channeling present and future asbestos claims to a trust if certain specified criteria are met, but *only* where an asbestos defendant can be forced into bankruptcy or enters it voluntarily. The section confers absolutely no power on the future claimants to force an *unwilling* defendant into bankruptcy. And as the District Court found, Fibreboard had long since determined that it would not voluntarily enter bankruptcy, given the prospect that by prevailing in the coverage litigation it could avoid bankruptcy altogether. CA 78a-79a, 376a. This section simply has no relevance to the actual circumstances of this case.*

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* Neither, for the same reason, does the dicta in *Keene Corp. v. Fiorelli*, 14 F.3d 726 (2d Cir. 1993), upon which petitioners rely. There, a former asbestos manufacturer that *could* have been (and shortly thereafter *was*) forced into bankruptcy tried to evade that result through a "preemptive" mandatory defendant class action seeking to *compel* all claimants to "settle" with it outside of bankruptcy. *See id.* at 728. The Second Circuit dismissed this "suit" for lack of a case or controversy and expressly did not decide the propriety of Rule 23(b)(1)(B) certification. *See id.* at 728, 730 & n.1, 733. The court's additional language on which petitioners rely thus (1) is a "gratuitous discussion" not necessary to the decision in that case (CA 75a n.14); and (2) does not speak to the issue

POINT II

RULE 23(b)(1)(B)'s PLAIN LANGUAGE DOES NOT VIOLATE THE CONSTITUTION OR THE RULES ENABLING ACT.

Petitioners are thus left to argue that application of the Rule's plain language violates the Constitution or the Rules Enabling Act. Their arguments on this score face two heavy burdens at the outset: (1) they must demonstrate why this Court should hold — for the first time ever — that an intended application of one of the Federal Rules of Civil Procedure would be unconstitutional or invalid, and that "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule [does not] transgress . . . the terms of the Enabling Act or constitutional restrictions" (*Hanna v. Plumer*, 380 U.S. 460, 471 (1965)); and (2) they must offer a coherent explanation why the federal courts, on their argument, are constitutionally foreclosed from achieving a unitary resolution whenever the case involves "*in personam*" claims (Br. 33, 40), no matter how devastating the consequences to the class. As shown below, they have not remotely done either.

A. Rule 23(b)(1)(B) is not unconstitutional.

Far from overcoming the presumption that the Rule's plain language is constitutional, petitioners' due process objection consists entirely of a series of *ipse dixit* pronouncements belied by a wealth of precedent.

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here whether the Bankruptcy Code forecloses the ability to settle even where the defendant could *not* be put into bankruptcy. (Moreover, on the occasions that the Second Circuit has actually *decided* the point — including one decision *subsequent* to the gratuitous discussion in *Keene* — it has squarely held that Rule 23(b)(1)(B) may properly be applied in appropriate cases involving insolvent entities. *See In re Joint E. and S. Dist. Asbestos Litig.*, 78 F.3d 764, 777-78 (2d Cir. 1996); *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721, 737-39 (2d Cir. 1992); *In re Drexel Burnham Lambert Co.*, 960 F.2d 285, 292 (2d Cir. 1992).)

1. *Where a unitary resolution is necessary to protect the class, the constitutionality of mandatory class treatment of monetary claims is long settled.* — As detailed in the opinion below, the constitutionality of mandatory class actions properly certified under the applicable rules of procedure is established by centuries of jurisprudence. CA 81a-84a. This Court has explicitly or implicitly approved mandatory class resolutions in a host of cases, including classes involving future claimants and classes involving monetary claims.* In such cases, due process requires only that absent class members be afforded adequate representation, not a right to opt out: it is a "familiar doctrine . . . that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present." *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); *see also Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1921) ("If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented."); *Smith v. Swormstedt*, 57 U.S. [16 How.] 288, 302-03 (1854) ("[A] court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The . . . rights and liabilities of all being before the court by representation, . . . there can be very little danger but that the interest of all will be properly protected and maintained.").

The controlling principle expressed by these cases is straightforward: where there is a legitimate need for a unitary resolution in order to protect the class, and where adequate representation is afforded, the general presumption in favor of

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* *See, e.g., Missouri v. Jenkins*, 495 U.S. 33, 37 n.2 (1990); *County of Riverside v. McLaughlin*, 500 U.S. 44, 49 (1991); *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 193 (1991); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366-67 (1921); *Smith v. Swormstedt*, 57 U.S. [16 How.] 288, 302-03 (1854); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 670-72 (1915).

individualized actions is subordinated to equitable concerns permitting a mandatory class action. *See, e.g., Smith*, 57 U.S. at 303 (citing the need to "prevent a failure of justice"); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 670 (1915) (citing the need to avoid "destructi[on] of [class members'] mutual rights"); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950) (citing the need to achieve a "final settlement," and stressing that due process cannot be construed to "place impossible or impractical obstacles in the way" of satisfying such a need); *see also West v. Randall*, 29 F. Cas. 718, 723 (C.C.D.R.I. 1820) (Story, J.) (emphasis added) (describing the common-law practice of mandatory class resolutions as standing on "[t]he principle . . . that the court must either wholly deny the plaintiffs an equitable relief, to which they are entitled, or grant it without making other persons parties; *and the latter it deems the least evil*").

Of particular importance, these cases have made clear that a legitimate need for a unitary class resolution of monetary claims *does* exist where — as here — such a resolution is necessary to secure the entire class's source of monetary recovery. For example, in *Smith*, this Court upheld a unitary resolution "to prevent a failure of justice" in circumstances much like those presented here: where persons with "separate and distinct" monetary claims against a pool of disputed assets brought a nationwide class suit to advance their "common interest[s]" in establishing their joint ownership of the disputed funds and a process for equitably distributing them, but where that relief could be secured only through a unitary resolution. *Id.* at 302-03. Similarly, *Supreme Tribe of Ben-Hur* validated a nationwide mandatory class resolution of monetary claims against an insurance trust — including fraud claims — where a uniform resolution binding "all of the class" was necessary to make the resolution "effective" and to permit the trust to continue to pay benefits owed to class members. *See* 255 U.S. at 359, 366-67. And in *Mullane*, this Court rejected a due process challenge identical to that raised by petitioners here to a mandatory resolution of money damages claims arising out of

the alleged negligent mismanagement of a trust where such a resolution was necessary to achieve a "final settlement" of all claims involving the trust. *See* 339 U.S. at 310-14.*

These precedents of this Court, moreover, reflect an even longer tradition of unitary class resolutions of monetary claims where necessary to prevent "a positive denial of justice" to class members. Story, *Commentaries on Equity Pleadings*, § 100 (2d ed. 1840); *see also id.* at §§ 97-98, 120-21. Mandatory "representative suits involving money claims were adjudicated in equity as a matter of course from early times" in those circumstances where class members' claims would otherwise be prejudiced. Z. Chaffee, *Some Problems of Equity* 285 (1950).** And it was well recognized that the circumstances permitting a unitary resolution included suits — precisely like that here — to establish a class's joint rights to disputed assets and a process for equitably distributing them among class members. *See Leigh v. Thomas*, 28 Eng. Rep. 201 (Ch. 1751) (mandatory class action may be brought by two members of the

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* Although *Mullane* was not technically a class action, it nonetheless involved a mandatory representative settlement of accounts encompassing "future," "contingent," "missing" and "unknown" parties from around the nation (who were represented by guardians ad litem). *See* 339 U.S. at 309-11, 317-18. This Court's rejection of the due process challenge in *Mullane* is accordingly fully applicable here.

** The dissent below erroneously attempted to explain away this practice of unitary resolutions of monetary claims as limited to circumstances where class members' individual claims were themselves equitable in nature. CA 130a-31a. The cases, however, make clear that courts of equity had power to achieve "equitable" unitary resolutions in order to prevent unfairness even where the underlying individual claims that gave rise to this need were claims at *law*: it was "immaterial that the basic issues [were] legal and not equitable." Chaffee, *supra*, at 156; *see also id.* at 151-52; *see also Smith*, 57 U.S. at 303 (power of a court to achieve a unitary resolution "to prevent a failure of justice" extends to "[t]he *legal* and equitable rights and liabilities of all being before the court by representation") (emphasis added); *Adair v. New River Co*, 32 Eng. Rep. 1153, 1159 (Ch. 1805) (describing the practice as allowing "a person, having at *Law* a general right to demand service from the individuals of a large district . . . [to] sue thus in Equity") (emphasis added).

crew of a privateer ship as representatives for the entire crew to establish crew members' rights to a share of prize money); *Good* v. *Blewitt*, 33 Eng. Rep. 343 (Ch. 1807) (same).*

Petitioners' attempt to distinguish these cases as involving "people with a pre-existing jural relationship" (Br. 29 n.23) is without merit. Class members here had no less of a "pre-existing jural relationship" than did the Methodist ministers with "separate and distinct" claims in *Smith v. Swormstedt* or than did the claimants in the other cases described above: all class members here had identical claims under and interests in the disputed insurance policies, upon which their potential recoveries were entirely dependent. *See* Class Br. 24-25. This action, in which they seek to resolve their rights of ownership of the proceeds of those policies notwithstanding the coverage dispute and thus necessarily to establish a process for equitable distribution of the proceeds, is analytically indistinguishable from, for example, *Smith* and *Good*, where class members sought to do the same with respect to their sources of recovery.

2. *There is no "in rem/in personam" distinction.* — Faced with this array of authority, petitioners resort to a hair-splitting distinction that they do not even argue has any basis in the language of Rule 23(b)(1)(B) or in so much as a single decided case. They contend that the permissibility of a unitary resolution of monetary claims turns not on whether the class has a legitimate need for such a resolution, but on a code-pleading categorization of the relief class members seek: according to petitioners, such a resolution is permissible where class members assert "*in rem* claim[s]" for "apportionment of a common fund," but is unconstitutional whenever the class instead asserts *in personam* "money damages" claims. Br. 40. In other words, they maintain that a unitary resolution would have been permissible here had the class sought to divide a "preexist[ing]"

* Other examples of unitary class resolutions of monetary claims at common law include *Adair v. New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805); *Chancey v. May*, 24 Eng. Rep. 265 (Ch. 1722); *Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676); and *Brown v. Booth*, 21 Eng. Rep. 960 (Ch. 1690).

"common fund" (Br. 32-34), but that such a resolution somehow became impermissible because class members needed it in order to secure the common fund in the first place.

This "distinction" is totally belied by the cases cited above. For example, the petitioners in *Mullane* made this precise argument, claiming that a unitary resolution of their monetary damages claims violated their due process rights to the extent it encompassed *in personam* tort damages claims, as opposed to *in rem* claims. *See* 339 U.S. at 311-12. Justice Jackson, writing for the Court, squarely rejected this proposed *in rem/in personam* distinction, holding that "the requirements of [due process] do not depend upon [this] classification . . . . Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law . . . we do not rest the power" to achieve a unitary resolution upon "this historic antithesis." *Id.* at 312-13. Likewise, in *Hansberry*, this Court — expressly citing *Smith* and *Supreme Tribe of Ben Hur* — described the practice of mandatory class resolutions of monetary claims as "a recognized exception" to the "general rule" that "judgment[s] *in personam*" are not binding against absent parties. 311 U.S. at 40-41.

Accordingly, *Mullane* and many of the cases referred to above involved classically *in personam* claims. For example, *Mullane* expressly involved *in personam* tort claims for money damages (339 U.S. at 311-14); *Supreme Tribe of Ben-Hur* involved claims for fraudulent inducement as well as monetary claims based on contractual rights (255 U.S. at 358-59); *Smith* involved class members' assertion of "separate and distinct" monetary claims of ownership of disputed funds as a matter of contract interpretation, and was an action (as here) not simply to allocate a "common fund," but to secure the class's right to that fund in the first place (57 U.S. at 300, 302); *Chancey* v. *May*, 24 Eng. Rep. 265 (Ch. 1722), involved fraud claims against the managers of a business; and *Adair v. New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805), involved alleged rent overpayments under a contract. *See also* Story, *Commentaries*, § 100, at 103 n.1 (describing the historical practice of unitary

resolutions of *in personam* monetary claims "for the purposes of justice" where "there will be a deficiency of assets, so that all the creditors cannot be paid in full").*

A long line of precedent thus squarely rejects petitioners' "*in rem*" talisman, and establishes instead that the federal courts may achieve a unitary resolution where necessary to protect the class — regardless of the particular nature of the claims that class members advance or the relief they seek. These precedents supply ample basis to sustain the judgment of "the Advisory Committee, this Court, and Congress" (*Hanna*, *supra*) in adopting the identical approach in Rule 23, and to sustain the application of the Rule's plain language here.

Rule 23(b)(1)(B), as the Fifth Circuit explained, is the present-day equivalent of the traditional class actions discussed above. CA 83a & n.16; *see* Advisory Committee Note, 39 F.R.D at 101 (expressly citing *Smith* and *Supreme Tribe of Ben-Hur* as examples of class actions within the Rule).** As its language makes clear, it likewise makes the propriety of a

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* Petitioners' effort to claim that — contrary to Justice Story and the precedents discussed above — there was actually a common law rule preventing unitary resolution of "*in personam*" claims and requiring that such claims be resolved individually and on the basis of "chronological priority" (Br. 32) rests solely upon a single 5-page decision of a state trial level court, which does not itself cite any authority for its assertion. Moreover, even this opinion goes on to indicate that, under traditional principles, a unitary "equity action" *could* be brought by *in personam* creditors "for the purpose of ratable apportionment." *David v. Bauman*, 196 N.Y.S.2d 746, 748 (N.Y. Sup. 1960). Petitioners also contend that the practice of unitary resolutions of *in personam* claims is inapplicable here because the settlement of this action does not contain all of Fibreboard's equity and because "other tort and trade creditors" of Fibreboard are not included within the class. Br. 35. These arguments are identical to the arguments of the Trial Lawyers shown to be without merit above. *See* pp. 29-30, *supra*.

** Rule 23(b)(1)(B) actions — and actions under the remaining subsections of Rule 23(b)(1) and (b)(2), which set forth other circumstances in which potential prejudice to the class or the defendant arising from opt-out rights necessitates a unitary resolution — trace their lineage from a series of equitable procedural rules providing mandatory class

unitary resolution turn on the need to protect class members rather than on the specific type of relief class members seek. By contrast, Rule 23(b)(3) requires opt-out rights in those actions that would *not* have qualified for class treatment at common law because class members would not be prejudiced by allowing separate suits, but as to which current procedure nonetheless allows class resolution of certain "common questions" where "convenient and desirable" to "achieve economies of time, effort and expense." Advisory Committee Note, 39 F.R.D. at 102-03; *see Amchem*, 117 S. Ct. at 2245-46.*

Nor have petitioners offered any reason whatever for their proposal that this Court change course, jettison almost 150 years of unbroken prior precedents and invalidate Rule 23(b)(1)(B)'s plain language. As discussed above, and as this case amply attests, class members often have an equal — or indeed a greater — need for a unitary resolution where the case does not involve "*in rem*" claims than where it does. *See* pp. 28-29, *supra*. And since the class here was adequately represented and the Global Settlement is indisputably fair, there is no question of unfairness to absent class members. *See* Class Br. 29-42; *Hansberry*, 311 U.S. at 41-43; *Smith*, 57 U.S. at 303 (unitary resolutions are permissible where adequate represen-

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mechanisms, including the seventeenth-century English Bill of Peace and Federal Equity Rule 38 (adopted in 1912), under which "[l]imited fund and other no-opt-out class actions were recognized" and "absent parties could be bound by . . . judgments." 1 Newberg on Class Actions, § 1.09 at 1-24; *see* Miller & Crump, *Jurisdiction and Choice of Law*, 96 Yale L.J. 1, 39-40 (1986). Indeed, their direct precursors were the non-opt-out "true" and "hybrid" class action categories of original Rule 23 (adopted in 1938). *See* 1 Newberg, § 1.09 at 1-25 - 1.27; 3B Moore & Kennedy, *Moore's Federal Practice* ¶23.31[1], at 23-235 (1992).

* Rule 23(b)(3) class actions are an innovation of the 1966 amendments to the Rule. To the extent they are traceable to any prior procedure, it is not to the traditional class action but to the "spurious" class action first created in 1938 by original Rule 23, which fashioned what was essentially a permissive joinder device, binding class members only if they opted *into* the class. *See* Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967).

tation is afforded because "[t]he . . . rights and liabilities of all being before the court by representation, . . . there can be very little danger but that the interest of all will be properly protected and maintained"). This Court is thus being asked to invent an *in rem/in personam* distinction in a context where the historical practice affirmatively *rejected* that distinction, where the language of the governing Rule does so as well, and where the distinction would greatly prejudice the class. The Court should decline the invitation.

3. *Shutts does not say otherwise.* — Finally, petitioners' invocation of a sentence in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), requiring opt-out rights on the facts of that case does nothing to avail their cause. As this Court has explained, this language in *Shutts* addresses only the question whether a "state court lacked personal jurisdiction over out-of-state class members, *not* the different and broader question of whether . . . due process requires that all class members have the right to opt out." *Adams v. Robertson*, 117 S. Ct. 1028, 1030 (1997) (emphasis added). It is thus totally irrelevant to petitioners' principal claim.

Nor does the sentence in *Shutts* support petitioners' fallback due process contention: that even if all class members do not have an absolute constitutional right to opt out, opt-out rights must be given to those class members who lack "minimum contacts" with the forum State. Br. 41. As this Court explained elsewhere in the *Shutts* opinion, "minimum contacts" requirements do *not* govern inclusion of absent plaintiffs within a class action. *Shutts*, 472 U.S. at 808-11. Accordingly, this Court's decisions in *Mullane* and *Smith* both explicitly upheld mandatory resolutions of monetary claims binding absent plaintiffs who lacked *any* contact at all with the forum State. *Mullane*, 339 U.S. at 309, 311; *Smith*, 57 U.S. at 289, 303.

Far from overruling *Mullane* and *Smith sub silentio*, the sentence in *Shutts* addresses personal jurisdiction concerns in a different genre of cases entirely: *state*-court class actions where the class has no need for a mandatory resolution and where such a resolution would thus have been impermissible under

the traditional practice set forth above. As the Fifth Circuit observed, *Shutts* involved a "class action brought under a state rule virtually identical to [Rule] 23(b)(3)" (CA 81a) — that is, there was no need for a unitary resolution, and the class was certified instead merely for litigation convenience. In a *federal* class action brought under these circumstances, Rule 23(b)(3) itself would give class members the right to opt out. There could, however, be no assurance that a *state* rule of procedure would do likewise: the sentence from *Shutts* invoked by petitioners was thus aimed at preventing *states* from circumventing personal jurisdiction limits on *state* courts by expanding *state*-court mandatory class actions to situations where such actions would not have been permissible under traditional practice. *See Adams*, 117 S. Ct. at 1030 (*Shutts* limited to the issue whether a "*state* court lacked personal jurisdiction over out-of-state class members") (emphasis added).* This sentence thus did not alter the settled validity — exemplified by *Mullane*, *Smith* and the other cases discussed above — of mandatory nationwide class actions involving monetary claims where a need for a unitary resolution *does* exist and where such a resolution thus *is* permissible under traditional practice.

For this very reason, the *Shutts* opinion expressly limited the sentence relied upon by petitioners to "those class actions

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* Indeed, as this Court indicated in *Adams*, the sentence in *Shutts* has no relevance at all to *federal* class actions. Whereas state courts can ordinarily assert jurisdiction only over parties having minimum contacts with the state, the Constitution permits federal courts to assert personal jurisdiction nationwide. *E.g.*, *United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 604 (1878). Contrary to petitioners' *ipse dixit*, this principle applies fully in diversity cases. It is easy to overlook this point because Rules 4(e) and 4(k) normally require that *defendants* in diversity cases have minimum contacts with the state in which the federal court sits. Those Rules, however, make expressly clear both that the requirement is *not* a constitutional one (Fed. R. Civ. P. 4(e), 4(k)(1)(D), 4(k)(2)) and that it applies only to a "defendant." By contrast, Rule 23 — the Rule governing inclusion of absent *class* members in a class action — imposes no such requirement in diversity cases.

which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments" and "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief." 472 U.S. at 811-12 n.3. As the Fifth Circuit explained, far from invalidating Rule 23(b)(l)(B)'s plain language and overruling this Court's prior cases without saying so directly, *Shutts* thus recognized the basic historical division reflected in Rule 23: unitary resolutions are permitted of those class actions that descend from *Smith*, *Mullane* and the other traditional "equitable" class actions discussed above — *i.e.*, class actions under Rules 23(b)(l) and (b)(2); opt-out rights are required for those that do not, where the use of the class action device is merely a form of "permissive joinder" — *i.e.*, Rule 23(b)(3). CA 83a & n.16; *see* p.41 n.*, *supra*.*

B. Rule 23(b)(1)(B) does not violate the Rules Enabling Act or the Rules of Decision Act.

For the same reasons, petitioners' Rules Enabling Act contention — for which they cite virtually no authority at all — is meritless. As shown above, the appropriateness of a unitary class resolution under the circumstances of this case was well-settled for centuries before the Enabling Act was enacted in 1938. *See* pp. 35-40, *supra*. There thus hardly could have been a contrary "substantive right" to opt out at that time, and there hardly can be one now. In effect, then, petitioners are arguing that the Enabling Act actually *contracts* the previously existing authority of the federal courts. This argument is without basis. *See Supreme Tribe of Ben-Hur*, 255 U.S. at 366 (rejecting claim that a Federal Equity Rule improperly conferred jurisdiction by "a rule of court" where class action was permissible under pre-existing practice).

Indeed, petitioners' unsupported claim that class members have a "substantive right" to seek judgments on their individ-

* In fact, as shown in the brief filed by the Plaintiff Class, the gravamen of this action is for quintessentially "equitable relief": a determination that the insurers in fact owe coverage on the class's claims notwithstanding the coverage dispute. Class Br. 24-26.

ual claims "*in full*" (Br. 32) — even where their doing so would greatly prejudice the rest of the class's claims — would effectively render unitary class resolutions impermissible in virtually *any* case, contrary to settled law. Absent class members can *always* assert this supposed "substantive right" to "full" recovery: to the full amount of their alleged damages in monetary cases, or to the broadest injunction or declaration where that relief is sought. And these class members can likewise *always* complain that a mandatory class resolution that gets them less than everything they asked for (as will inevitably happen in settlement, and as will frequently happen where the case is litigated) is an illegitimate forced compromise of this "substantive right" through the rules of procedure.*

No sensible argument can be made that application of Rule 23 to certify the class in such a situation violates the Rules Enabling Act. Any limitation on class members' "rights" to full recovery results from the *settlement*, not from the bringing of this action under Rule 23. As in *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 445-46 (1946), the bringing of this action as a class action under Rule 23 — as distinguished from the *settlement* of the action — merely "subject[ed] petitioners' rights to adjudication by [a particular] district court"; it did "not operate to abridge, enlarge or modify the rules of decision by which that court w[ould] adjudicate [petitioners'] rights," and "relate[d] merely to the manner and the means by which a right to recover is enforced."** Unless one is prepared to say

* This would include the very "*in rem*" situation in which petitioners themselves allow that a unitary resolution would be permissible: even where a class has claims against a "preexist[ing]," insufficiently large "fund," each class member may have an individual claim to a 100-cents-on-the-dollar, disproportionate share of that fund. Petitioners are silent (a) why, on their novel view of the Rules Enabling Act, these individual rights to seek "full" recovery can be "limited" to protect the class's overall interest; and (b) why the supposed "substantive right" to full recovery can be limited in that situation but in no other.

** Totally misrepresenting the brief in opposition filed by the Plaintiff Class, petitioners assert that respondents "concede that the whole point of the class certification here was to abridge state-law rights

that, by virtue of the Rules Enabling Act, a mandatory class action can be brought and adjudicated, but may never be *settled* for less than "full" recovery — a rather absurd proposition — petitioners' argument cannot stand. The essential safeguards against abrogation of substantive rights are the provisions of Rule 23 limiting the types of cases in which non-opt-out classes may be certified, the requirement that the class be adequately represented and the Rule 23(e) requirement that any settlement be adjudicated to be fair. *See Hansberry*, 311 U.S. at 40-43.* All of these requirements were met here.

For the same reasons, there is no merit to petitioners' claim that the unitary Global Settlement violates the Rules of *Decision* Act because the class's underlying claims were state-law rather than federal in nature. Once again, the very minor outer limits the Settlement imposes on class members' recoveries in "back-end" suits against the Trust in the tort system (*see* pp. 21, *supra*; Class Br. 16-17) are the product of a fair settlement as to which the class was properly certified and adequately represented. Since *some* limits on state-law claims (or recoveries arising from them) are an inevitable part of *any* class settlement involving such claims, petitioners' argument boils down to the untenable proposition that it is impossible to set-

'by limiting class members' rights to obtain immediate and full payment of their individual state-law claims.' " Br. 33 (quoting Class BIO 20). This partial quotation excises the remainder of the sentence, which contends that petitioners "*err*" in asserting exactly that, as well as the ensuing 3 pages of discussion so demonstrating.

* The basic principle is simple: assuming that the class is properly certified, the class adequately represented and the settlement fair, the class may through settlement agree to that which an individual litigant could agree. *See Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 883 (1996) (class release of claims that were not before state court and over which court did not have subject-matter jurisdiction); *TBK Partners v. Western Union*, 675 F.2d 456, 460 (2d Cir. 1983); *Grimes v. Vitalink*, 17 F.3d 1553, 1564 (3rd Cir. 1994); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991).

tle *any* mandatory class action in a diversity case without running afoul of the Rules of Decision Act.*

POINT III

THE NOTICE CAMPAIGN — THE MOST EXTENSIVE IN HISTORY — WAS CONSTITUTIONALLY ADEQUATE.

Petitioners' final objection is that class members were not provided with notice sufficient to satisfy the requirements of due process. Petitioners do not suggest that the parties could have improved in any way upon the $18 million worldwide television, direct mail and newspaper notice campaign here — the most comprehensive such campaign ever in a class action. *See* pp. 12-13, *supra*. Instead, they advance one last categorical rule: that future claimants can *never* be given constitutionally adequate notice in any class action. Br. 43.

This proposition is completely devoid of support. Indeed, this Court specifically rejected this precise argument in its seminal decision on due process notice requirements: *Mullane v. Central Hanover Bank*. At issue in *Mullane* was a mandatory representative settlement that "settle[d] all questions" respecting the management of a trust, including *in personam* tort claims for money damages held by "future," "contingent," "missing" and "unknown" beneficiaries. 339 U.S. at 309-11, 317-18. Reasoning that "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way" of such a resolution "could not be justified," this Court rejected petitioners' categorical approach regarding notice to future claimants. It held instead that current publication notice — far *less* extensive notice than was afforded here — was sufficient with respect "to those beneficiaries whose

* There is similarly no merit to amicus American Trial Lawyers' Association's contention that the Global Settlement abridges the right to a jury trial by placing some (likewise minor) limits on what a jury can award (an argument that would make it impossible to settle virtually any mandatory class action involving monetary claims).

interests are either conjectural or future" or who could not be identified without "impractical and extended searches." *Id.* at 313-14, 317. As Justice Jackson wrote for the Court:

> [t]his Court has not hesitated to approve of resort to publication as a customary substitute . . . where it is not *reasonably possible or practicable* to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

Id. at 317 (emphasis added).

This holding — that due process requires only the best notice "reasonably possible or practicable," and does not create a "constitutional bar to a final decree foreclosing the[ ] rights" of future claimants who cannot be identified and given actual notice through reasonable effort — has been reconfirmed by this Court many times over in ensuing years. *See, e.g., Tulsa Professional, Inc. v. Pope*, 485 U.S. 478, 490 (1988) (publication notice "can suffice" for claimants "who are not reasonably ascertainable"); *Mennonite Bd. v. Adams*, 462 U.S. 791, 798 (1983) (constructive notice sufficient for claimants "not reasonably identifiable"); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974) (individual notice not required to class members not "identifiable through reasonable effort"); *Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962) (because of the "practical impossibility" of providing actual notice to "unknown persons," publication notice may suffice for persons not "known or very easily ascertainable"); *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956) (not "reasonably possible to give personal notice . . . where people are . . . unknown"). And contrary to petitioners' meaningless "distinction" — that *Mullane*, while involving a mandatory representative action, "did not involve a class action" (Br. 43) — this Court has squarely deemed *Mullane*'s holding to be fully applicable to class actions. *E.g., Eisen*, 417 U.S. at 174-75.

Moreover, petitioners' proposal that the Court effectively overrule *Mullane* is particularly meritless in the context of the *mandatory* class action settlement involved here. *First*, based on the settled precedent of *Mullane*, this Court and the lower courts routinely decide mandatory class action suits involving claims on behalf of unknown, future claimants — including, for example, future schoolchildren, future housing tenants, future employees, and future prisoners. *See, e.g., Missouri v. Jenkins*, 495 U.S. 33, 37 n.2 (1990); *County of Riverside v. McLaughlin*, 500 U.S. 44, 49 (1991); *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 193 (1991). Likewise, as the Fifth Circuit observed, Rule 23(b)(1)(B) class actions "often involve unknown or unavailable claimants" and "bind[ ] future, contingent, and unknown claimants." CA 84a.* This practice recognizes that, while the precise identities of the persons who will ultimately be future claimants cannot be known now, those persons sometimes need an immediate resolution to protect the rights they will eventually develop — as did the class members here. Petitioners' argument that these class members can never be given constitutionally adequate notice, however, would invalidate this practice completely.

Second, class members in mandatory class settlements do *not*, by definition, need to make an individual decision whether to opt out of the action. The only decision that confronts them is whether to *object* to the settlement for purposes of the district court's fairness hearing on the settlement and any subsequent review: if the courts approve the settlement, all class members are bound, whether they objected or not. And on this point, the interests of potential unknown objectors are fully represented by those class members who do object. For example, it is clear that the petitioners here — who intervened in this case as objectors at the fairness hearing, and have litigated

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* These actions, in turn, grew out of the even older practice of representative actions to resolve the future claims and protect the future interests of unborn heirs or unborn trust beneficiaries. *See, e.g., McArthur v. Scott*, 113 U.S. 340, 401-02 (1885).

every imaginable challenge to the Global Settlement — have fully represented the point of view opposing the Settlement.

This contrasts sharply with the situation in Rule 23(b)(3) opt-out class actions, where class members need to make an immediate, individual and *personal* decision whether to opt out of the action or settlement entirely — a decision as to which unknown future class members are *not* represented by other parties, which they may lose the opportunity to make if not given actual notice, and which they may not be able intelligently to make even if they are given such notice. It was *this* issue — and not the continued vitality of *Mullane* in the *mandatory* class context — that this Court "recognized" in *Amchem* as a potential issue for future decision: whether current notice can provide future claimants with "the information . . . needed to decide, intelligently, whether *to stay in or opt out*." 117 S. Ct. at 2252 (emphasis added).* Petitioners' suggestion that *Amchem*'s reservation of this possible issue somehow draws the seminal decision in *Mullane* into question in this distinct mandatory class context is without basis.

In short, since the best notice "reasonably possible or practicable" was provided here — as the District Court found and as petitioners do not contest — due process was satisfied.

Conclusion

The mandatory class settlement here falls foursquare within the plain language of Rule 23(b)(1)(B). It is concededly fair under Rule 23(e). It in no way runs afoul of the Bankruptcy Code, the Rules Enabling Act or Due Process. For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

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* Petitioners' cropping of their quote from *Amchem* immediately prior to the words identifying this Court's concern as pertaining to an opt-out decision (Br. 42) — as well as their assertion on the following page that *Amchem* actually reached a "conclusion" on this issue rather than simply recognizing it for future decision — are nothing short of a blatant misrepresentation of that case.

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APPENDIX

11 U.S.C. § 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if —

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2)(A) there is pending a foreign proceeding; and there is pending a foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.